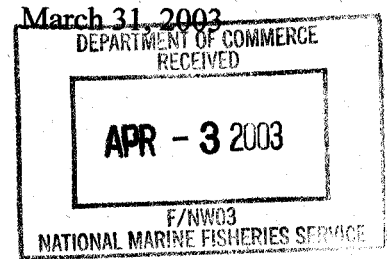


VIA FAX AND FIRST CLASS MAIL

Chief, Protected Resources Division
National Marine Fisheries Service
535 NE Oregon Street, Suite 500
Portland, OR 97232



Re: Advance Notice of Proposed Rulemaking to Designate the Eastern North Pacific Southern Resident Stock of Killer Whales as Depleted Under the MMPA.

Dear Chief, Protected Resources Division,

On behalf of our more than one half million members and supporters, including nearly 35,000 throughout the Pacific Northwest and southern British Columbia and an additional 200,000 activists on marine issues, Defenders of Wildlife ("Defenders") appreciates the opportunity to comment on the National Marine Fisheries Service's ("NMFS") Proposed Rulemaking ("PR") to designate the eastern North Pacific Southern Resident stock ("Southern Residents") of killer whales (*Orcinus orca*) as a depleted stock under the Marine Mammal Protection Act. 68 Fed. Reg. 4,747 (January 30, 2003).

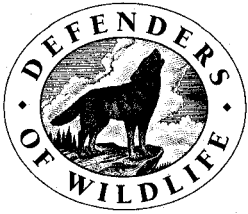
Defenders is re-submitting our original comments from August 30, 2002. We would like to have NMFS include these same comments in the record for the PR.

Sincerely,

Jim Curland, Marine Program Associate
Rennie Anderson, Associate Counsel

Cc: David Cottingham, Tim Ragen, Marine Mammal Commission
Brent Plater, Center for Biological Diversity
Patti Goldman, Earthjustice
Naomi Rose, Toni Frohoff, The Humane Society of the United States

National Headquarters
1101 Fourteenth Street, N.W.
Suite 1400
Washington, D.C. 20005
Telephone: 202-682-9400
Fax: 202-682-1331
www.defenders.org
www.kidsplanet.org



August 30, 2002

VIA FAX AND FIRST CLASS MAIL

Chief, Protected Resources Division
National Marine Fisheries Service
535 NE Oregon Street, Suite 500
Portland, OR 97232

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On behalf of our more than one half million members and supporters, including nearly 35,000 throughout the Pacific Northwest and southern British Columbia and an additional 200,000 activists on marine issues, Defenders of Wildlife ("Defenders") appreciates the opportunity to comment on the National Marine Fisheries Service's ("NMFS") Advance Notice of Proposed Rulemaking ("ANPR") to designate the eastern North Pacific Southern Resident stock ("Southern Residents") of killer whales (*Orcinus orca*) as a depleted stock under the Marine Mammal Protection Act ("MMPA"). 67 Fed. Reg. 44,132 (July 1, 2002).

Defenders, established in 1947, is a national non-profit organization dedicated to the protection of all native wild animals and plants in their natural communities. Defenders focuses its programs on what scientists consider two of the most serious environmental threats to our planet: the accelerating rate of species extinction and associated loss of biological diversity, and habitat alteration and destruction. Long known for its leadership role on endangered species issues, Defenders also advocates new approaches to wildlife conservation that will help prevent species from becoming endangered. Our programs encourage protection of entire ecosystems and interconnected habitats while protecting predators that serve as indicator species for ecosystem health.

In a decision issued concurrently with this ANPR, NMFS announced its "not warranted" determination on the petition of the Center for Biological Diversity and others to list the Southern Resident orcas as endangered under the Endangered Species Act ("ESA"). 67 Fed. Reg. 44,133 (July 1, 2002). Defenders believes that NMFS's failure to list the Southern Residents under the ESA is unlawful. Although Defenders agrees with NMFS' determination that, at a minimum, the Southern Residents are entitled to an MMPA depleted designation, this designation alone is simply insufficient to protect this

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population of orcas. Over the past five years, the Southern Residents have declined by an alarming 20 percent (ending with the survey in 2001). The population faces a variety of threats, including high levels of toxic pollutants, a decline in their preferred salmon prey, and human disturbances, among other factors. Indeed, as NMFS acknowledged in rendering its "not warranted" determination for ESA listing, the Southern Residents are in imminent danger of extinction. Thus, while the protections afforded to depleted populations under the MMPA are certainly justified, they are inadequate: additional measures available only to species listed under the ESA are essential to protecting the Southern Residents from further precipitous decline. As set forth in the petition to list the Southern Residents as endangered, the Southern Residents qualify as a distinct population segment ("DPS") and are thus eligible for and entitled to immediate protection under the ESA, including development and implementation of a comprehensive recovery plan, designation of critical habitat, and application of the section 7 conservation and consultation requirements and the section 9 take prohibition. The MMPA "depleted" status is inadequate to address: habitat protections; the vast toxic pollution problems; the need to create strong regulations to end harassment; and an enforceable recovery plan.

After finding both that the Southern Residents are a discrete population of killer whales, and that this population faces a high risk of extinction – findings that should have ended NMFS' inquiry and resulted in ESA protection for the DPS of Southern Resident orcas – NMFS nonetheless went on to deny the petition to list the population as endangered. This denial was based on the ground that the Southern Residents do not qualify as a DPS because they are not "significant," a criteria that stems solely from agency policy and is found nowhere in the ESA or its regulations. Defenders believes: (1) that the DPS policy upon which NMFS relied represents an unlawful interpretation of the ESA, and (2) that NMFS misapplied even this policy in a decision that runs counter to the best available scientific evidence and information that was before it. Thus, in declining to list the Southern Residents under the ESA, NMFS violated both the ESA and the Administrative Procedure Act.

Although NMFS attempted to support its decision to deny ESA protection to the Southern Residents by relying on "uncertainties" in the taxonomic classification of killer whales, this purported justification falls short. The ESA clearly encompasses a precautionary principle of conservation, giving the benefit of the doubt to the species, see Connor v. Burford, 848 F.2d 1441 (9th Cir. 1988), and compelling listing based on the best science and information available at the time of the listing decision, 16 U.S.C. § 1533(b)(1)(A). Indeed, based on these uncertainties, the Marine Mammal Commission ("Commission") recommended in comments to NMFS that the agency consider additional, alternative criteria for assessing significance, such as the ecological significance of this population to the marine ecosystems of the northeast Pacific, and other factors suggested by the ESA's statement of findings and purposes. Letter from Robert Mattlin, Executive Director of Marine Mammal Commission, to Donald Knowles, Director of Office of Protected Resources, NMFS, at 3 (March 22, 2002). Moreover, the Commission stressed the importance of applying the precautionary principle, "particularly when the existing population may be a remnant of a once larger population that has declined in status as a result of human activities, and when the loss of this population would diminish the genetic diversity of killer whales and the marine ecosystems of which the whales are a part." March 22, 2002 Letter at 3-4.

Chief, Protected Resources Division

August 30, 2002

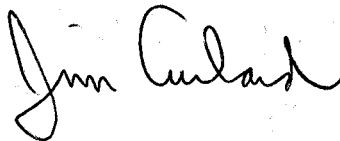
Page 3 of 3

The following passage comes from a Congressional Report issued in 1979 (S. Rep. No. 96-151, 96th Cong., 1st Sess. 7), and serves as a clear reminder that Congress considered this very issue and determined that individual populations of a species may be entitled to protection even where conclusive data is not available regarding all populations:

The committee agrees that there may be instances in which FWS should provide for different levels of protection for populations of the same species. For instance, the U.S. population of an animal should not necessarily be permitted to become extinct simply because the animal is more abundant elsewhere in the world. Similarly, listing populations may be necessary when the preponderance of the evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations.

Under these circumstances, while Defenders agrees that the Southern Resident population of orcas qualifies for MMPA depleted status, Defenders reiterates our position that NMFS' refusal to list the Southern Residents under the ESA is unlawful, and urges NMFS to reconsider its denial of the petition to list. Protection under the ESA is absolutely critical to the survival and recovery of this population.

Sincerely,



Jim Curland, Marine Program Associate
Rennie Anderson, Associate Counsel

Cc: Robert Mattlin, Tim Ragen, **Marine Mammal Commission**
Brent Plater, **Center for Biological Diversity**
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